IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA	)	CASE NO. 1:16CR00226-001
	)	
Plaintiff,	)	JUDGE: JOHN ADAMS
	)	
-vs-	)	REPLY TO UNITED STATES' SENTENCING MEMORANDUM
	)	
NICOLE GATES	)	
	)	
Defendant.	)	

Respectfully submitted,

Now comes the Defendant Nicole Gates and submits the following reply to the United States sentencing memorandum.

The government's contention that a four- level enhancement for losses in excess of $15,000 pursuant to §2B2.1(b)(1)(C) applies is without merit. The government argues that Gates should be held responsible for all amounts alleged in the indictment.

Relevant Conduct

U.S.S.G §1B1.3 permits a court to consider, as relevant conduct, all acts and omissions "that were part of the same course of conduct or common scheme or plan as the *offense of conviction*." Relevant conduct requires conduct or a scheme or plan similarly oriented toward the same or a like offense, not simply conduct of a like character that has only an attenuated link to illegality. While similarities exist between the conduct in acquitted counts one through fourteen and the counts of conviction, such as the same injured party and a like modus operandi, similarity alone does not demonstrate a *course of conduct* or a common scheme or plan. United States v. Yaroch , 2008 WL 2129846.

In Yaroch supra, the defendant a bank officer plead no contest to one count of an eighty-two count information charging him with bank fraud and misapplication of bank funds. The defendant issued loans for non-existent businesses for purposes other than stated in the loan application. The district count found that the dismissed eighty-two counts constituted relevant conduct and included these loan amounts in the amount of loss for sentencing purposes. The appellate court reversed and remanded to determine whether a connection existed between the acquitted conduct and the offense of conviction. " The linkage to the offense of conviction rests on conduct that similarly involves wrongdoing" Yaroch at p. 16.

In this case, there is no connection between the acquitted conduct and the offense of conviction. The offenses of conviction are for payments received in Oct. and Nov. 2015. The payments Gates received in April, May, June, July, Aug, and Sept. were all based on objective medical findings and supported by the evidence presented at trial and as the jury found involved no wrongdoing. A clear example is Gates receipt of compensation for the time she was off immediately following her fourth knee surgery on Aug. 24 2015. As the jury found, these payments were clearly legitimately received and thus have no connection to the counts of conviction.

Amount of Loss

Even if the court finds the acquitted conduct to be "relevant" conduct, the amount of loss should still be the amount set forth in the PSR. In United States v. Waldren , 431 Fed. Appx. 374 (Sixth Cir. 2014), the court found error where the District Court determined the amount of loss in a worker's comp fraud case to be the sum of all benefits received without offsetting the amount the defendant would have received had he been honest on his application. For the reasons set forth above, Gates contends that she was entitled to receive all the payments for the amounts set forth in the acquitted counts.

_s/Kirk A. Migdal___________

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